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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHAUN SALAS,

Plaintiff and Appellant;

GILBERT SALAS,

Plaintiff and Respondent,

v.

MERCURY INSURANCE COMPANY,

Defendant and Appellant.

G042194

(Super. Ct. No. 30-2008-00102496)

O P I N I O N

Appeals from a judgment of the Superior Court of Orange County,
David T. McEachen and Kirk H. Nakamura, Judges. Affirmed in part, reversed in part,
and remanded.

Merritt L. McKeon for Plaintiff and Appellant and for Plaintiff and
Respondent.

O'Connor, Schmeltzer & O'Connor, Lee P. O'Connor and Timothy J. O'Connor for Defendant and Appellant.

* * *

INTRODUCTION

Shaun Salas was involved in an automobile accident, while driving a vehicle owned by his father, Gilbert Salas. (To avoid confusion, we will refer to the members of the Salas family by their first names; we intend no disrespect.) Shaun's automobile insurance carrier, Mercury Insurance Company (Mercury), denied coverage for the accident on the ground Gilbert's car was not covered under the terms of the policy. Shaun sued for tortious breach of the insurance policy. The trial court granted a motion for summary adjudication in favor of Mercury of Shaun's bad faith claim. Following a bench trial, the court found Mercury had breached the insurance contract, and awarded damages to Shaun and Gilbert. Shaun appealed, and Mercury cross-appealed.

We conclude the trial court did not err in granting the motion for summary adjudication. Because Shaun's two claims—breach of contract and bad faith—were combined in one cause of action, the court could properly grant summary adjudication of the bad faith claim. A genuine dispute as to coverage was established by Mercury, and the court properly determined Shaun could not state a claim for bad faith on the part of Mercury.

We further conclude the trial court did not err by denying Shaun's motion to amend the complaint to add the bad faith claim back into the complaint immediately before trial.

Finally, we conclude the Mercury insurance policy did not provide coverage for the accident.

With respect to Shaun's appeal, the judgment is affirmed. With respect to Mercury's cross-appeal, the judgment is reversed and remanded with directions to enter judgment in favor of Mercury on the cross-appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mercury issued an automobile insurance policy to Shaun, covering the period from April 20, 2007 to October 20, 2007 (the Mercury policy). The only vehicle listed in the policy declarations was Shaun's 1993 Honda Prelude. On May 5, 2007, while driving a 2006 Toyota Tundra owned by his parents, Gilbert and Marilyn, Shaun (then age 26) collided with a car driven by Teresa Huyn Nguyen (the Nguyen accident).¹

On the date of the accident, Gilbert and Marilyn's address was 20666 Calle De La Ladera, in Yorba Linda. Shaun lived in a studio located behind, and separate from, the main house in which Gilbert and Marilyn lived. The studio does not have a separate mailing address, nor does it have separate utilities.

Nguyen's insurance carrier paid insurance benefits to her, and then filed a lawsuit against Shaun and Gilbert for subrogation. Mercury denied coverage to Shaun for the accident because the Toyota Tundra was not a listed vehicle on the Mercury policy, nor was it covered by the Mercury policy as an owned or nonowned automobile. Shaun sued Mercury for tortious breach of the insurance contract.

Mercury filed a motion for summary judgment or, in the alternative, summary adjudication. Judge David T. McEachen denied the motion for summary judgment, but granted summary adjudication of the claim for bad faith.

In February 2009, at the start of trial, Shaun filed a motion to amend the complaint to add the cause of action for bad faith that had been summarily adjudicated

¹ Gilbert and Marilyn had automobile insurance coverage for the Toyota Tundra, but Shaun was excluded as a covered driver on that vehicle.

against him. The trial court denied Shaun’s motion. The parties stipulated to add Gilbert as a plaintiff to the complaint.

A bench trial was conducted based on the parties’ trial briefs, stipulated facts, and evidence. Judge Kirk H. Nakamura issued a tentative decision on March 6, 2009, finding in favor of Shaun and against Mercury.² Judgment in favor of Shaun and Gilbert, and against Mercury, in the amount of \$26,250, was entered on April 9, 2009. Shaun timely appealed. Mercury filed a timely notice of cross-appeal.

DISCUSSION

I.

DID GILBERT FILE A TIMELY APPEAL?

We invited the parties to submit supplemental letter briefs addressing whether Gilbert filed a timely appeal from the judgment. Shaun and Gilbert concede that Gilbert did not file a notice of appeal, and did not pay the required filing fees. They contend (without any evidentiary support, by means of a declaration or otherwise) that Mercury’s counsel agreed that Gilbert’s notice of joinder in Shaun’s appeal would suffice to add Gilbert as an appellant. The parties to an appeal cannot, of course, create appellate jurisdiction where none exists. (See, e.g., *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1468.)

Shaun and Gilbert contend that Gilbert’s “interests are so closely joined by that of Shaun Salas, that they should be considered co-appellants rather than separate parties or, in the alternative, be joined to the action.” The authorities Shaun and Gilbert

² The tentative decision provided that it would become a statement of decision unless either party specified controverted issues or made proposals not covered by the tentative decision within 10 days. Shaun and Gilbert filed a timely objection to the tentative decision, arguing that damages should have been awarded to them jointly. On our own motion, we augment the record on appeal with the objection to the tentative decision, filed in *Salas v. Mercury Insurance Group* (Super. Ct. Orange County, No. 30-2008-00102496), on March 16, 2009. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

cite for this proposition are inapposite. They cite *People v. Nero* (2010) 181 Cal.App.4th 504, 510, footnote 11, and California Rules of Court, rule 8.200(a)(5), for the rule that an appellant may join in or adopt by reference the arguments raised in another appellant's briefs. This rule, however, does not allow a party who has not filed a notice of appeal to simply join in the appeal of a proper appellant.

Shaun and Gilbert also cite *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 318, in which the Supreme Court held: "Absent contrary evidence, in a policy with multiple insureds, exclusions from coverage described with reference to the acts of 'an' or 'any,' as opposed to 'the,' insured are deemed under California law to apply collectively, so that if one insured has committed acts for which coverage is excluded, the exclusion applies to all insureds with respect to the same occurrence. [Citations.]" This rule of insurance contract interpretation has no application to a determination whether a party has filed a proper, timely notice of appeal.

We conclude Gilbert did not file a timely notice of appeal, and is not an appellant in this case. Because Mercury's cross-appeal is from the judgment entered in favor of both Shaun and Gilbert, Gilbert is a respondent to the cross-appeal.

II.

MOTION FOR SUMMARY ADJUDICATION

We review an order granting a motion for summary adjudication de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.)

Shaun argues the trial court erred by granting the motion for summary adjudication of the bad faith claim while discovery was ongoing. Specifically, Shaun argues the deposition of Rhonda Rosales, a claims adjuster for Mercury, was not conducted until January 12, 2009, more than one month after the motion for summary adjudication was granted. Code of Civil Procedure section 437c, subdivision (h) permits a party to submit affidavits identifying the facts essential to opposing a motion for summary judgment and/or summary adjudication and to request a continuance to permit

those facts to be obtained; Shaun did not submit such an affidavit requesting a continuance in opposition to Mercury's motion. The trial court did not abuse its discretion in ruling on the motion for summary adjudication in the absence of a request to continue. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 714.)

Shaun also argues the trial court improperly granted summary adjudication of less than a full cause of action. "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) Shaun's complaint alleged a single cause of action for "tortious breach of insurance contract." The complaint sought both compensatory and exemplary damages.

That Shaun's breach of contract claim and bad faith claim were pleaded as a single cause of action is not dispositive. "In our judgment the clearly articulated legislative intent of [Code of Civil Procedure] section 437c, subdivision (f), is effectuated by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action. To rule otherwise would defeat the time and cost saving purposes of the amendment and allow a cause of action in its entirety to proceed to trial even where, as here, a separate and distinct alleged obligation or claim may be summarily defeated by summary adjudication. Accordingly, we hold that under subdivision (f) of section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-1855, fn. omitted; see also *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1688, fn. 11.) In a case alleging breach of an insurance contract and breach of the implied covenant of good faith and fair dealing, a trial court may properly grant summary adjudication of a bad faith claim and a request for punitive damages. (*Nazaretyan v. California Physicians' Service* (2010) 182 Cal.App.4th

1601, 1614, fn. 6.) The trial court did not err in summarily adjudicating the bad faith claim, although Shaun pleaded it in combination with his separate claim for breach of the insurance contract.

When an insurer refuses, ““without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing.’ [Citation.]” (*Neal v. Famers Ins. Exchange* (1978) 21 Cal.3d 910, 920.) Mercury would have acted in bad faith only if its refusal to pay policy benefits to Shaun was unreasonable. (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973.) The reasonableness of Mercury’s refusal to pay benefits may be summarily adjudicated as a matter of law. (*Id.* at fn. 1.) An objective test applies; Mercury’s subjective state of mind is immaterial. (*Id.* at p. 973.)

Under the genuine dispute doctrine, an insurer refusing to pay policy benefits due to a genuine dispute with the insured regarding the existence or amount of coverage is not liable for bad faith, although it might still be liable for breach of contract. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073.)

Did Mercury provide to the trial court undisputed material evidence that its decision to refuse to pay policy benefits, due to its conclusion that the Nguyen accident was not covered by Shaun’s policy, was not unreasonable? Yes. Mercury offered evidence that the vehicle Shaun was driving when he was involved in the Nguyen accident was neither an owned nor a nonowned automobile as provided in the Mercury policy, because the Toyota Tundra was owned by a relative of Shaun’s. Although this is not dispositive for purposes of the breach of insurance contract claim, it is sufficient to establish the reasonableness of Mercury’s coverage decision.

In his response to Mercury’s separate statement of undisputed material facts, Shaun offered evidence that only two of those facts were disputed: “Shaun Salas lives at 20666 Calle De La Ladera in Yorba Linda, California 92887,” and “Shaun Salas’

parents, Marilyn and Gilbert Salas, live at 20666 Calle De La Ladera in Yorba Linda, California 92887.” To dispute those facts, Shaun stated, “[t]his is Shaun’s mailing address as it is for other people. Shaun lives in a separate, unattached and wholly self suffi[ci]ent home, by himself. Mar[i]lyn and Gilbert Salas do not live with him.” Shaun’s supporting evidence consisted of (1) his declaration, and (2) excerpts from the depositions of Shaun, Marilyn, and Gilbert.

Shaun’s declaration states he does not live in the same building as Gilbert; it does not state he does not live at 20666 Calle De La Ladera, or that Gilbert and Marilyn do not live at that address.

At their depositions, Marilyn and Gilbert were each asked the following question: “Where do you presently live?” Both replied: “20666 Calle De La Ladera.” At his deposition, Shaun was asked, “[w]here do you live at the present time?” and replied, “Yorba Linda. Address 20666 Calle . . . De La . . . Ladera . . . , Yorba Linda, California, zip code 92887.” Rather than creating a dispute of material facts, the deposition transcripts support Mercury’s separate statement of undisputed material facts.

At best, the evidence offered by Shaun in opposition to the motion for summary adjudication established there was a genuine dispute between Mercury and Shaun as to the existence of coverage under the policy. The trial court correctly determined Mercury had refuted Shaun’s bad faith claim, and properly granted the motion for summary adjudication.

II.

MOTION TO AMEND THE COMPLAINT

We review the trial court’s denial of Shaun’s motion to amend the complaint to add back the cause of action for bad faith for abuse of discretion. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

The cause of action for bad faith was summarily adjudicated against Shaun. We have not been cited to any authority for the proposition that a motion to amend under

Code of Civil Procedure section 473, subdivision (a)(1), may be used to add into a complaint a cause of action that had been summarily adjudicated under Code of Civil Procedure section 437c. Indeed, the governing statute provides that if the motion for summary adjudication is granted, the decided issues “shall be deemed to be established” and the action shall proceed on any remaining issues. (Code Civ. Proc., 437c, subd. (n)(1).) Shaun’s motion to amend was not timely as a motion for reconsideration. (Code Civ. Proc., § 1008, subd. (a).)

Although Shaun claims newly discovered evidence was obtained after the motion for summary adjudication was granted, that evidence is the deposition of Mercury’s claims adjuster. As explained *ante*, Shaun failed to seek a continuance of the summary adjudication hearing to obtain necessary facts from the claims adjuster’s deposition. Under Code of Civil Procedure section 437c, Shaun could not rely on the existence of those facts after the motion was granted to seek to amend the complaint on the eve of trial.

The trial court did not err in denying the motion to amend the complaint.

III.

DID THE COURT ERR IN DETERMINING MERCURY BREACHED THE INSURANCE CONTRACT?

Mercury’s cross-appeal involves the interpretation, construction, and application of the Mercury policy to determine whether there was coverage; we review the matter de novo. (*Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 125.)

The insured, Shaun, had the burden of proving the Nguyen accident was covered by the Mercury policy. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 16; *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 803.) “While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. [Citation.] The fundamental goal of contractual

interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.] On the other hand, ‘[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.’ [Citations.] This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, ‘the objectively reasonable expectations of the insured.’ [Citation.] Only if this rule does not resolve the ambiguity do we then resolve it against the insurer. [Citation.] [¶] In summary, a court that is faced with an argument for coverage based on assertedly ambiguous policy language must first attempt to determine whether coverage is consistent with the insured’s objectively reasonable expectations. In so doing, the court must interpret the language in context, with regard to its intended function in the policy. [Citation.] This is because ‘*language in a contract* must be construed in the context of that instrument as a whole, and in the circumstances of that case, and *cannot be found to be ambiguous in the abstract.*’ [Citations.]” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.)

The Mercury policy covers liability for bodily injury and property damage “caused by accident, arising out of the ownership, or use, of an owned automobile by an insured or arising out of the use of a non-owned automobile by an insured.” The Toyota Tundra involved in the Nguyen accident was not listed on the Mercury policy’s declarations page, and does not fall within the Mercury policy’s definition of an “owned automobile.” A “non-owned automobile” is defined by the Mercury policy as “a vehicle that: [¶] (a) is used with permission of the owner of the vehicle and [¶] (b) *is not owned by*, or leased to, or registered to, or available for the regular use of, the named insured, any other persons listed as drivers in the policy declarations, an insured’s employer, an insured’s employee, *a relative*, the named insured’s non resident spouse, a person residing with an insured, a corporation, partnership or other legal entity in which the

combined ownership interest of the named insured and relatives exceeds twenty percent and [¶] (c) has never been owned by or registered to the named insured, or any other persons listed as drivers in the declarations and [¶] (d) is not a motor vehicle or a trailer used for commercial purposes and [¶] (e) is a private passenger automobile or a utility automobile or a trailer.” (Italics added.) The italicized language is what we are considering in this case.

Mercury contends there is no ambiguity in the Mercury policy, and the Nguyen accident was not covered because Shaun was not driving a covered nonowned automobile at the time. Mercury points to the Mercury policy’s definition of “relative,” and claims that definition is clear and unambiguous. As relevant to this appeal, the Mercury policy defines “relative” as “a person who resides with the named insured and is related to the named insured by blood, marriage or adoption” The terms “reside” and “residing” are not defined by the Mercury policy. We cannot agree with Mercury that the term “relative” is clear and unambiguous when the definition contains another term—resides—that is not defined and can be read in more than one way. Both meanings given to the term by the parties—living at the same address, and living in the same building—are reasonable. Webster’s Third New International Dictionary (2002) at page 1931 defines “reside” as “to dwell permanently or continuously : have a settled abode for a time : have one’s residence or domicile.”

Although the terms “reside” and “residing” are not defined by the Mercury policy, “resident” is defined as “an individual who inhabits the same dwelling as the named insured.” Mercury contends it is inappropriate to consider the definition of “resident” because the coverage decision was governed by the definition of “relative.” However, a reasonable insured would look to the definition of “resident” to determine the meaning of the undefined terms “resides” and “residing” when used in the same insurance policy.

Neither “dwelling” nor “inhabits” is a defined term in the Mercury policy. “Dwelling” is defined in Webster’s Third New International Dictionary, *supra*, at page 706, as “a building or construction used for residence.” This definition is consistent with Shaun’s contention that the separate building behind Gilbert and Marilyn’s house, in which he lives, is a separate dwelling, and thus Gilbert would not be a “relative” under the terms of the Mercury policy because Shaun and Gilbert do not inhabit the same building.³

Two pieces of evidence are especially relevant in determining what Shaun’s reasonable expectations were regarding coverage under the Mercury policy. First, the application for the Mercury policy contains an exclusion which reads as follows: “NAME BELOW all persons, except those listed on Page 1, *who reside with the applicant*, INCLUDING ALL MINOR CHILDREN.” (Italics added.) Marilyn and Gilbert are listed as persons who reside with Shaun. Shaun’s signature appears immediately below the handwritten statement, “I have read and understand this exclusion and I do read English.” Although this portion of the application addresses the exclusion of Gilbert and Marilyn from coverage, it is relevant to a determination of how Mercury believed Shaun reasonably understood the terms of the Mercury policy, especially the terms “resides” and “residing.” (See *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1264-1265.)

Second, in a telephonic interview conducted soon after the Nguyen accident, Shaun told a Mercury claims adjuster that he lived with Gilbert. In a separate telephonic interview, Marilyn told the claims adjuster Shaun resided with her. Both

³ “Inhabit” is defined in Webster’s Third New International Dictionary, *supra*, at page 1163, as “to occupy as a place of settled residence or habitat.” This dictionary definition does not assist us in determining whether there was coverage for the Nguyen accident under the Mercury policy.

Shaun and Marilyn stated that their responses to the questions posed during those interviews were made under penalty of perjury.

Another tool for interpreting an insured's reasonable expectations of coverage in a policy is to consider how the ambiguous term is used elsewhere in the policy. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1116 [reasonable to assume one term has same meaning when used in two different parts of insurance policy].) In part II of the Mercury policy, regarding expenses for medical services, Mercury agrees to pay reasonable medical expenses “[t]o or for the named insured and each relative who sustains bodily injury caused by an accident resulting in a collision while occupying an owned automobile or a non-owned automobile or who, as a pedestrian, sustains bodily injury caused by contact with a moving motor vehicle. [¶] . . . To or for any other person who sustains bodily injury, caused by accident, resulting in a collision, while occupying [¶] (a) the owned automobile, if being used by the named insured, by a relative or by any other person with the permission of the named insured; or [¶] (b) a non-owned automobile, if the bodily injury results from (1) its operation by the named insured or its operation on his behalf by his private chauffeur or domestic servant or (2) its operation by a relative listed in the declarations.” As a reasonable insured, would Shaun have expected that, if Gilbert and Marilyn had suffered bodily injury as the result of an accident while they had been passengers in Shaun’s Honda Prelude and Shaun was driving, Mercury would cover Gilbert and Marilyn’s medical expenses? The answer must be yes, and Shaun cannot have the word “relative” mean two different things in the same policy.

We conclude that, although Shaun does not live in the same building as Gilbert and Marilyn, Gilbert is a relative of Shaun’s, as that term is used in the Mercury policy. A reasonable insured would objectively expect that the term “relative,” as used in the Mercury policy, includes a person related to the insured by blood, who lives on the

same property and uses the same mailing address. We reverse the judgment as to Mercury's cross-appeal, and direct the trial court to enter judgment in favor of Mercury.

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded. The trial court is directed to enter judgment in favor of Mercury, and against Shaun and Gilbert Salas. In the interests of justice, no party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.